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**Supreme Court of the United States**

OCTOBER TERM, 1951

**No. 224**

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY AND WASHINGTON TRANSIT RADIO, INC.,  
PETITIONERS,

*vs.*

FRANKLIN S. POLLAK AND GUY MARTIN

**No. 295**

FRANKLIN S. POLLAK AND GUY MARTIN,  
PETITIONERS,

*vs.*

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY AND WASHINGTON TRANSIT RADIO, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 224—PETITION FOR CERTIORARI FILED AUGUST 3, 1951

No. 295—PETITION FOR CERTIORARI FILED AUGUST 30, 1951

CERTIORARI GRANTED OCTOBER 15, 1951

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 10,777

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FRANKLIN S. POLLAK, GUY MARTIN, *Appellants,*

v.

PUBLIC UTILITIES COMMISSION OF THE  
DISTRICT OF COLUMBIA, ET AL., *Appellees.*

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Appeal from the United States District Court for the  
District of Columbia

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JOINT APPENDIX.

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Filed Jul 5 1950

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1655-50

POLLAK, ET AL., *Plaintiffs,*

v.

PUBLIC UTILITIES COMMISSION, ET AL., *Defendants.*

Civil Action No. 1694-50

TRANSIT RIDERS ASSOCIATION, *Plaintiff,*

v.

PUBLIC UTILITIES COMMISSION, ET AL., *Defendants.*

Civil Action No. 1716-50

PAUL NATHANIEL TEMPLE, *Plaintiff,*

v.

PUBLIC UTILITIES COMMISSION, ET AL., *Defendants.*

**Opinion of Court**

TAMM, J: I will pass on the motions at the present time.

Consolidated for the purpose of argument before the Court today are motions to dismiss filed by the Public Utilities Commission, the Capital Transit Company and the Washington Transit Radio, Incorporated, in actions entitled Pollak, et al. v. Public Utilities Commission, Transit Riders' Association v. Public Utilities Commission, and Temple v. Public Utilities Commission.

There are several points with reference to the status of the individual plaintiffs that arise, particularly in the cases of Transit Riders Association v. Public Utilities Commission and Temple v. Public Utilities Commission, upon which the Court does not believe it is necessary to pass at this



time because of the Court's desire to treat the motions upon what appears to the Court a fundamental point that is common to all three cases.

The Court, as I indicated at the opening of this hearing this morning, has spent the better part of several days reviewing the memorandum of points and authorities submitted by counsel representing the parties in all three cases. The Court has reviewed the vast majority of the cases cited by counsel in connection with their positions on the various motions. The Court has reviewed the basic law, starting with the statute under which the action was  
4 taken, and going back to determine what constitutes the right of privacy on which a person believing his right of privacy would be predicated may bring suit.

The Court from its study of all the facts and elements of these cases is of the opinion that basically there is no legal right of the petitioners in any three of these cases which has been invaded, threatened or violated by the action of the Public Utilities Commission and, accordingly, the Court will grant the motion of the Commission to dismiss in all three cases.

Mr. Segal: If the Court please, this may be in excessive caution, but, sometimes it is necessary to give notice of appeal as provided for by the statute.

The Court: It isn't necessary. Counsel will submit the necessary orders.

### CERTIFICATE OF COURT REPORTER

I, Ralph E. Minier, an official reporter for the United States District Court for the District of Columbia, do hereby certify that the foregoing is the official transcript of the Opinion of the Court in the above-entitled actions.

RALPH E. MINIER,  
*Official Court Reporter.*

Filed Apr 13 1950

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

Civil Action No. 1655 '50

FRANKLIN S. POLLAK, *Petitioner*

1333 - 27th Street, N. W.

Washington 7, D. C.

and

GUY MARTIN, *Petitioner*

3117 Woodley Road, N. W.

Washington 8, D. C.

Against

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

and

JAMES H. FLANAGAN, GORDON R. YOUNG and KENNETH W.  
SPENCER, constituting the Public Utilities Commission  
of the District of Columbia, *Respondents*

**Petition of Appeal by Franklin S. Pollak and Guy Martin  
From Order No. 3612 of the Public Utilities Commis-  
sion of the District of Columbia, Dated December  
19, 1949.**

Franklin S. Pollak and Guy Martin (hereinafter called the "petitioners"), pursuant to the provisions of paragraph 65 of Section 8, Chapter 150, Act of March 4, 1913, 37 Stat. 974; as amended, now District of Columbia Code (1940) Sections 43-704 and 43-705, file this joint petition of appeal from Order No. 3612 of the Public Utilities Commission of the District of Columbia (hereinafter called the "Commission"), dated December 19, 1949, and each for himself says:

6      1. By its Order No. 3560, dated July 14, 1949, the Commission ordered "that an investigation be made

to determine whether or not the installation and use of radio receivers on the street cars and busses of Capital Transit Company is consistent with public convenience, comfort and safety; and that a formal public hearing be held upon the subject of the investigation at a time to be fixed by notice of hearing." Pursuant to notice of hearing dated September 19, 1949, a public hearing on the subject of the investigation was held on October 27, 28 and 31, and November 1, 1949.

2. By orders of the Commission at the opening of the hearing the petitioners were severally granted leave to intervene in the proceeding.

3. Following the close of the hearing the petitioners, on November 23, 1949, filed a joint brief with the Commission, in which they prayed for an order prohibiting the reception of radio broadcasts in the vehicles of Capital Transit Company, and for other relief. That brief is incorporated herein by reference.

4. By its Order No. 3612 of December 19, 1949, hereby appealed from, the Commission stated its conclusion that the installation and use of radios in street cars and busses of Capital Transit Company is not inconsistent with public convenience, comfort and safety, and ordered that the investigation initiated by Order No. 3560 be dismissed.

5. Petitioners were then and have ever since been obliged to use the street cars and busses of Capital Transit Company in connection with the practice of their profession and on other occasions and are thereby subjected against their will to the broadcasts in issue. These broadcasts make it difficult for petitioners to read and converse and deprive them of their privacy. For these reasons the petitioners were at the time of the said Order No. 3612 and have ever since been affected by that order.

6. Pursuant to Paragraph 64 of Section 8 of the aforesaid Act, the petitioners filed with the Commission on January 18, 1950, an Application for Reconsideration and Other Relief and a Supplementary Application for Recon-



sideration and Other Relief, both of which are herein incorporated by reference.

7. By its Order No. 3631, dated February 15, 1950, the Commission denied the petitioners' Application and Supplementary Application for Reconsideration and Other Relief.

8. Pursuant to Paragraph 65 of Section 8 of the aforesaid Act, the petitioners assign the following as grounds and reasons for this appeal from the said Order No. 3612:

A. The Order appealed from recites, under the heading "Conclusion", that the installation and use of radios in streetcars and busses of Capital Transit Company "is not an obstacle to safety of operation"; that "public comfort and convenience is not impaired and that, in fact, through the creation of better will among passengers, it tends to improve the conditions under which the public ride"; and that for these reasons it "is not inconsistent with public convenience, comfort and safety.". The Order contains no

8 subsidiary findings of fact and it contains no findings of fact whatever except in so far as the aforesaid "Conclusion" may be considered a finding of fact.

In failing to contain subordinate findings of fact the Order is unreasonable, arbitrary and capricious and in violation of the requirements of paragraphs 65 and 66 of Section 8 of the aforesaid Act.

B. Petitioners' brief filed November 23, 1949, contained twenty-nine separately numbered paragraphs of proposed findings of fact. They related, respectively, to the following matters:

(1) The business and monopoly position of Capital Transit Company.

(2) Its contract with Washington Transit Radio, Inc., for the installation of radio receivers and broadcasting services.

(3) The number of radio receivers installed.

(4) The contract of Washington Transit Radio, Inc., with the operator of Station WWDC-FM for broadcasting to the receivers.

(5) The date of beginning of the broadcasts to the vehicles and their daily hours.

(6) The content of the programs broadcast.

(7) Institutional or promotional announcements broadcast to the vehicles at the request of Capital Transit Company.

(8) The sale and purchase, for private profit, of time for commercial announcements on these programs.

9 (9) The nature of the installations in the vehicles and the impossibility of escaping the sound of the broadcasts within the vehicles.

(10) The irrelevance of the possible payments to Capital Transit Company above the minimum guarantee.

(11) The insignificance of the guaranteed minimum payments by Washington Transit Radio, Inc., to Capital Transit Company in relation to Capital Transit Company's gross transit revenue—\$0.0007 per cash fare and \$0.009 per weekly pass.

(12) The fact that hundreds of thousands of persons are daily compelled to use Capital's vehicles.

(13) Surveys of riders' reactions to these broadcasts in April and October 1949.

(14) Percentages of objectors as shown by these surveys.

(15) Percentage of those who did not favor these broadcasts as shown by the October survey.

(16) The objections stated in the April and October surveys.

(17) The omission, from the questionnaire used in these surveys, of any question asking those favoring these programs whether they would forego them if a minority objected.

(18) The grounds of objection stated at the hearing herein.

10 (19) The intensity of the objectors' opposition.

(20) The survey of operators' opinion in October 1949 and what it showed.

(21) Reasons for thinking that this survey may not reflect the full extent of operator opposition.

(22) The impossibility of shutting off the sense of hearing.

(23) The estimate that at least 15,000 passengers each week-day object to these radio programs.

(24) Serious mental and physical injury to a number of riders will result from these programs on the basis of present installations.

(25) The harm to riders will be increased if radio receivers are installed in all 15,000 vehicles.

(26) The programs are a danger to public safety, because of their effect on some operators.

(27) These petitioners are compelled to ride in vehicles of Capital. The broadcasts interfere with their reading and conversing and deprive them of their privacy.

(28) The riders on Capital's vehicles, other than chartered busses, are a captive audience. Capital's contrasting treatment of chartered busses, as to which it has competition.

(29) The harm done to objectors exceeds the good done to supporters.

11 Each of the proposed findings is supported by substantial evidence. All but a very few of them are unopposed by any evidence whatever, and none is opposed by substantial evidence. The Order appealed from discusses none of the proposed findings, mentions none of them and adopts none of them, and is, therefore, arbitrary, capricious and unreasonable.

C. The "Summary of Testimony" in the Order appealed from is not, and does not purport to be, a finding of fact. It is incomplete, incorrect, misleading, arbitrary, capricious and unreasonable, biased and prejudiced and contrary to the law and facts of the case.

D. The Order appealed from is unlawful in that it "dismissed" the investigation without stating in the ordering portion the Commission's ultimate finding on the subject of the investigation.

E. The Order recites that "the investigation conducted and the evidence presented . . . must, of necessity, be considered by this Commission strictly in the light of its jurisdictional powers". Nothing in the Order states explicitly what the Commission means by this statement nor to what contentions it is addressed, but, read in conjunction with the rest of the Order, this statement is manifestly a ruling that the points of law made by the petitioners are beyond the Commission's jurisdictional powers in this proceeding. In so ruling, the Commission erred as a matter of law.

F. The Order does not consider the merits of any of the points of law made by the petitioners or by the other parties to the proceeding. It does not discuss a single court decision, prior Order of the Commission, statute or regulation cited by the petitioners or any other party. It thus erred as a matter of law.

G. The Order does not refer to any rule of law or legal authority whatever. It thus errs as a matter of law.

H. The Order is arbitrary, capricious and unreasonable and otherwise unlawful in that it is contrary to the following rights, duties, liabilities and legal authorities, each one of which was urged by the petitioners and each one of which requires a holding that the broadcasts are contrary to public convenience, comfort and safety:

(1) The right of objecting riders, under the First Amendment to the United States Constitution, to listen or not to listen, and to read or not to read.

(2) The right of objecting riders, under the Fifth Amendment to the United States Constitution, not to be deprived of their liberty (privacy, and leisure and health), without due process of law and not to have their private property (time and health), taken for private use or without compensation.



(3) The duty of a common carrier to take extra care for the protection of riders known to be more susceptible to injury than the majority of passengers.

(4) The liability for the physical consequences of emotional distress intentionally and unreasonably caused.

13 (5) The liability of a common carrier to its customers for injury caused to them upon its land by any natural or artificial condition, known to the common carrier, which it is reasonably necessary for the public to encounter in order to secure its services.

(6) The rule that in such a case as this the "public" is injured if a significant minority is injured.

(7) The right of privacy.

(8) The Police Regulations of the District of Columbia, Article VI, Sections 1 and 2, which prohibit the use within the District of Columbia of any "mechanical device . . . or instrument for intensification of the human voice or of any sound or noise for advertising purposes." Under Paragraph 90 of Section 8 of the aforesaid Act the Commission has the duty of enforcing compliance with these regulations.

(9) The Commission's Orders No. 683 of September 29, 1927 and No. 711 of June 19, 1928, requiring that the noise incident to the operation of street cars and busses shall be kept to a minimum and prohibiting any "material change in equipment" without prior approval by the Commission of the plans and specifications therefor. No such approval has been requested or given in this case.

(10) The prohibition, in the aforesaid Act, of any unjust, unreasonable or discriminatory service, act or practice and of a greater charge, or demand for a greater compensation, than is specified in a rate schedule on file.

14 (11) The provision of the Joint Resolution of January 14, 1933, that all of Capital Transit's powers shall be exercised subject to the supervision of and regulation by the Commission as provided by law.

(12) The provision of the Capital Transit's corporate charter, which are such that its participation in the arrangements for these broadcasts is *ultra vires*.



I. The Order is unreasonable, arbitrary and capricious and otherwise unlawful in approving a larger number of installations than had been made at the time of the hearing.

J. The Order is arbitrary, capricious and unreasonable and otherwise unlawful in that it did not direct a reopening of the hearing for the admission of newly available evidence, as set forth in the petitioners' Application and Supplemental Application for Reconsideration.

K. The Order is arbitrary, capricious, unreasonable and otherwise unlawful in not granting the petitioners' request to amend the Order of Investigation so as specifically to invoke all of the Commission's statutory powers referred to by the petitioners and so as to raise thereunder all questions relevant to the propriety of these broadcasts.

L. The Order is arbitrary, capricious and unreasonable and otherwise unlawful (a), in determining that the installation and use of radio receivers is not inconsistent with public convenience, comfort and safety, (b) in failing to determine the contrary, and (c) in failing to prohibit such installation and use.

15 M. The Order is arbitrary, capricious and unreasonable and otherwise unlawful in failing to define precisely what it approved; in failing to state that authorization of additional installations is without prejudice to later review by the Commission; and in failing to state that the authorization does not relate to installation in terminal facilities, waiting rooms, and division headquarters.

N. By its conduct of the hearing generally, and its exclusion of evidence thereat, by its orders and their contents, by its manner of disposing of the contentions of the petitioners, by its total failure to develop the legal rights of members of the public and the medical aspects of the case, and by its total failure to call for independent expert testimony on the public-opinion surveys, the sound levels, and other matters, and in other ways, the Commission has demonstrated bias and prejudice in favor of the broadcasts, and its Order is unreasonable, arbitrary, capricious, biased and prejudiced.

Wherefore the petitioners pray:

1. That the Court determine and declare that the Commission erred in ruling in effect, that the points of law made by the petitioners are beyond the Commission's jurisdictional powers in this proceeding; and instruct the Commission as to its jurisdictional powers.

2. That the Court determine and declare that the Commission erred in totally failing to consider the merits of the points of law made by the petitioners or by the other parties to the proceeding, and in totally failing to consider or mention the court decisions, prior orders of the Commission, statutes and regulations cited by the petitioners or the other parties to the proceeding; and instruct the Commission as to its duty in the premises.

3. That the Court determine and declare that the Commission erred in making its decision without mention of any rules of law or legal authorities; and instruct the Commission as to its duty in the premises.

4. That the Court determine and declare that the Commission erred in upholding none of the petitioners' legal contentions made in their Brief and their Application for Reconsideration and Other Relief, and in failing to uphold all of them; and instruct the Commission that all of these legal contentions are correct and should have been upheld.

5. That the Court determine and declare that the so-called "Summary of Testimony" in the Commission's Order is incomplete, incorrect, misleading, arbitrary, capricious, unreasonable, biased and prejudiced; and instruct the Commission as to its errors therein.

6. That the Court determine and declare that the "Conclusion" set forth in the Commission's Order does not purport to be, and is not, supported by any findings of fact; that it cannot be supported by findings of fact; that it is arbitrary, capricious, unreasonable, biased and prejudiced and contrary to the facts and law of the case; and that, accordingly, the Commission erred in making this conclusion.

7. That the Court determine and declare that the Commission erred in not making any subsidiary findings of fact whatever and in not making any findings of fact of any character except in so far as the aforesaid "Conclusion" may be considered a finding of fact; and instruct the Commission concerning its duty to make findings of fact.

8. That the Court determine and declare that the Commission erred by not incorporating in the ordering portion of its order its ultimate finding on the subject of the investigation; and instruct the Commission as to its duty in the premises.

9. That the Court determine and declare that each of the proposed findings of fact requested by the petitioners is supported by substantial evidence, which in most cases is uncontradicted; that none of them is opposed by any substantial evidence and almost all of them by no evidence whatever; that in failing to make the findings of fact proposed by the petitioners the Commission's Order is arbitrary, capricious, unreasonable, biased, prejudiced and otherwise unlawful; and the petitioners pray the Court to instruct the Commission to make each of the findings of fact proposed by the petitioners.

10. That the Court determine and declare that the Commission erred in not finding that the installations and use of radio receivers in the street cars and busses of Capital Transit Company is inconsistent with public convenience, comfort and safety; and instruct the Commission that the facts of record and the law applicable to the issues require a finding by the Commission that the installation and use of radio receivers in the street cars and busses of Capital Transit Company is inconsistent with public convenience, comfort and safety.

11. That the Court determine and declare that the Commission erred in not prohibiting the installation and use of radio receivers in the street cars and busses of Capital Transit Company; and instruct the Com-

mission that it is its duty to prohibit such installation and use.

12. That the Court vacate the Commission's Order No. 3612.

Petitioners further pray for the following relief in case the Court should consider (contrary to the petitioners' contentions), that there are any questions of fact in this case requiring further consideration by the Commission:

13. That the Court determine and declare that the Commission erred in not granting petitioners' request, as set forth in their Application for Reconsideration and Other Relief, that the Commission, on notice to Capital Transit Company and Washington Transit Radio, Inc., amend its Order of Investigation so as to invoke all of the powers of the Commission referred to in the discussion in that Application of the Commission's jurisdiction and so as to raise under such powers all questions bearing on whether the broadcasts should be approved; and instruct the Commission to proceed accordingly.

14. If it should be the Court's view that the Commission (contrary to its Order herein and contrary to petitioners' contentions herein), could properly attach any significance to the possibility of payments by Washington Transit Radio, Inc., to Capital Transit Company over and above the minimum guarantee of six dollars per radio-equipped vehicle per month, then, in that case, we pray the Court (a) to determine and declare that the Commission erred in excluding at the hearing evidence tendered by the petitioners with reference to the present and future earnings of the radio station from these broadcasts, and (b) to instruct the Commission to reopen the hearing to receive evidence concerning such earnings.

15. If it should be the view of the Court (contrary to the Petitioners' contentions), that the number of those favoring these broadcasts, as shown by the public-opinion surveys in evidence, can be regarded by the Commission as significant for the disposition of the case, then, in that



event, we pray the Court (a) to determine and declare that the Commission erred in not granting petitioners' request for a reopening of the hearing to permit the petitioners to introduce evidence attacking the public-opinion surveys and showing that they overstated the extent of support for the broadcasts and (b) to instruct the Commission to reopen the hearing for that purpose.

16. If it should be the view of the Court (contrary to the petitioners' contentions), that the testimony of Mr. McIntosh, notwithstanding opposing testimony, can be regarded by the Commission as supporting a decision in favor of continuance of the broadcasts, then, in that case, petitioners pray the Court (a) to determine and declare that the Commission erred in not granting petitioners' request for a reopening of the hearing to permit the petitioners to introduce evidence along the lines of Dr. Heilprin's affidavit of January 17, 1950 and (b) to instruct the Commission to reopen the hearing for that purpose.

17. If it should be the view of the Court (contrary to the petitioners' contentions), that the Commission may properly attach any significance, for the disposition of this case, to the testimony by Mr. Giddings, Vice-President of Capital Transit Company, that the drivers of the vehicles are authorized to turn the receivers off "when they consider that

it is too loud", then, in that event, petitioners pray  
20 the Court (a) to determine and declare that the Commission erred in not granting the petitioners' request for a reopening of the hearing to permit the petitioners to introduce evidence to the contrary as shown by the statement of Mr. Merrill, President of Capital Transit Company, quoted in Mr. Seelig's affidavit of January 16, 1950; and (b) to instruct the Commission to reopen the hearing accordingly.

18. If it should be the view of the Court (contrary to the petitioners' contentions), that the Commission could in some event make findings warranting it in permitting the



continuance of the broadcasts, then, in that event, petitioners pray the Court (a) to determine and declare that the Commission erred in not granting petitioners' request that the Commission in that event by order (i) define precisely what is approved, stating, among other things, permissible types of programs, the limits on the length and frequency of commercials, the limits on the boosting of the loudness of all portions of the broadcasts, and the plans and specifications of the speakers and receivers, and (ii) authorize only the number of installations actually made at the time of the hearing, and (b) to instruct the Commission that any order by it permitting the continuance of the broadcasts would have to contain the provisions so requested by the petitioners.

And the petitioners pray for such other and further relief as to the Court may seem proper.

Respectfully submitted,

FRANKLIN S. POLLAK  
GUY MARTIN

April 23, 1950

22

Filed May 2 1950

### **Motion to Dismiss by Capital Transit Company**

Capital Transit Company moves the Court to dismiss the appeal herein on the grounds that:

1. The petition of appeal fails to show that petitioner is a person or corporation affected by the orders of the Commission appealed from;
2. The Court lacks jurisdiction of the subject matter of the appeal for the reason that the orders appealed from are not subject to review under Section 43-705, D. C. Code, 1940;
3. The reasons for the appeal set forth in the petition

of appeal are insufficient to state a claim upon which relief can be granted.

Dated at Washington, D. C. this 2nd day of May, 1950.

EDMUND L. JONES  
Colorado Building  
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DARYAL A. MYSE  
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N. W.  
Washington 6, D. C.

*Attorneys for Capital  
Transit Company.*

23

Filed May 2 1950

**Motion to Dismiss by Washington Transit Radio, Inc.**

Washington Transit Radio, Inc. moves the Court as follows:

1. To dismiss the appeal on the ground that the Court lacks jurisdiction because the petitioners are not persons or corporations affected by any final order or decision of the Commission and because the appeals fail to state a justiciable controversy.
2. To dismiss the appeal because the petitioners fail to state a claim upon which relief can be granted.

Dated at Washington, D. C. this 2nd day of May, 1950.

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*Attorneys for Washington  
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